ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Global NAPs, Inc. Petition for	)	CC Docket No. 99-354
Preemption of Jurisdiction of the	)	
Massachusetts Department of	)	
Telecommunications and Energy	)	
Pursuant to Section 252(e)(5) of the	)	
Telecommunications Act of 1996	)	

APPLICATION FOR REVIEW

GLOBAL NAPS, INC.

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SUMMARY

Global NAPs, Inc. ("Global NAPs") seeks Commission review of the Common Carrier Bureau decision denying its petition for preemption of the jurisdiction of the Massachusetts Department of Telecommunications and Energy ("DTE") pursuant to Section 252(e)(5) of the Telecommunications Act of 1996.

This case arises out of the interconnection agreement between Global NAPs and Bell Atlantic-Massachusetts. Global NAPs, which provides competitive local exchange service to customers that include a number of Internet Service Providers (ISPs), believes that the interconnection agreement requires Bell Atlantic to compensate it for ISP-bound traffic it terminates on behalf of Bell Atlantic customers. Bell Atlantic has refused to provide compensation despite sending Global NAPs more than 5 billion minutes worth of such traffic.

In an effort to resolve this dispute, Global NAPs in April 1999 filed a formal complaint against Bell Atlantic before the DTE. When the DTE failed to act on the complaint, Global NAPs filed a petition asking the FCC to preempt the DTE's jurisdiction pursuant to Section 252(e)(5). Shortly before the deadline for Commission action on Global NAPs' petition, the DTE suddenly issued an order in a separate proceeding announcing that it had mooted Global NAPs' complaint. The state's claim to have mooted the dispute was patently inaccurate -- the order that supposedly accomplished this asserted repeatedly that disputes with Bell Atlantic over compensation for ISP traffic remained unresolved. And the Commission itself recognized in a proceeding involving Global NAPs' interstate tariff for ISP traffic that the DTE had resolved none of the issues in Global NAPs' complaint against Bell Atlantic.

Citing deference to state orders, the Common Carrier Bureau refused to examine the DTE's claim that it had mooted Global NAPs' complaint and denied Global NAPs' petition for preemption. Commission review of the Bureau's Order is warranted because the Order is in direct conflict with the plain language of Section 252(e)(5), which requires the FCC to determine whether a state has, in fact, acted with respect to an interconnection dispute. The Bureau's refusal to look behind a state commission's claim to have mooted an interconnection dispute is, quite simply, a refusal to comply with Section 252(e)(5).

The Order also conflicts with Commission precedent addressing a state's claim that it has mooted the underlying dispute in a preemption proceeding. The Commission has recognized that a state's claim to have mooted the underlying dispute is, in essence, a representation that the state has acted with respect to that dispute. Whether the state has acted is, in turn, the very question a preemption petition places before the Commission. Deference to the state's order has no place in such a context because the Commission must address the accuracy of the state's representation if it is to discharge its obligation under Section 252(e)(5).

Finally, the Order is invalid on its face because the Bureau has authority to act only with respect to matters that are minor, routine or settled in nature. This is not such a case. Moreover, Section 252(e)(5) clearly requires a Commission-level decision within 90 days of the filing of a preemption petition.

The Commission should grant Global NAPs' Application for Review and reverse the Bureau's Order as expeditiously as possible.

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To: The Commission

APPLICATION FOR REVIEW

Global NAPs, Inc. ("Global NAPs"), by its attorneys and pursuant to 47 U.S.C. § 155(c) and Section 1.115 of the Commission's Rules,[1] seeks Commission review of the Common Carrier Bureau Order[2] denying its petition for preemption of the jurisdiction of the Massachusetts Department of Telecommunications and Energy ("DTE") under Section 252(e)(5) of the Telecommunications Act of 1996 (the "Act").[3]

I. INTRODUCTION

Global NAPs believes that its interconnection agreement with New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") requires Bell Atlantic to treat ISP-bound calls on the same terms as purely "local" calls and asked the DTE to decide this question in a complaint filed in April 1999. When the DTE did nothing about the

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[1] 47 C.F.R. § 1.115.

[2] *See Global NAPs Inc. Petition for Preemption of Jurisdiction of the Massachusetts Department of Telecommunications and Energy Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, Memorandum Opinion and Order* (DA 00-510), released March 7, 2000 ("*Order*").

[3] 47 U.S.C. § 252(e)(5).

complaint for some eight months, Global NAPS filed a petition under Section 252(e)(5) to preempt the DTE's jurisdiction over that dispute. Almost 11 months after Global NAPs filed its complaint and two weeks before the deadline for the Commission to act on the petition for preemption, the DTE suddenly announced in a separate proceeding that it was dismissing Global NAPs' complaint because a prior decision in that proceeding had rendered the complaint moot. The DTE's claim to have mooted Global NAPs' complaint was patently incorrect and summarily denied Global NAPs any opportunity to litigate the issues in its complaint before the DTE.

The Common Carrier Bureau ("Bureau") refused to hold that the DTE's administrative "shell game" amounted to a failure to act under Section 252(e)(5) and, instead, stated that it would not review the validity of an underlying state commission decision. The problem with the Bureau's approach is that, in this case, the DTE claims erroneously to have mooted ***and therefore to have acted*** with respect to Global NAPs' complaint – the very issue the Commission must examine under Section 252(e)(5). The Commission cannot discharge its duty under the Act unless it reviews the validity of <u>that</u> aspect of the DTE's order. The Bureau's *Order* is directly at odds with Commission precedent establishing that Section 252(e)(5) requires the agency to review a state's claim that it has mooted a petition for preemption. The *Order* also contradicts the fundamental mandate of Section 252(e)(5) that the Commission "*shall* issue an order preempting the State commission's jurisdiction" when a state has failed to act (emphasis added). Finally, the *Order* is illegal on its face both because the issue involved in this case is not within the Bureau's delegated authority and because Section 252(e)(5) plainly requires a Commission-level decision within 90 days of the filing of a petition for preemption. As a result, Commission review of the *Order* is warranted under Section 1.115(b)(2)(i) of the Commission's Rules because the *Order* is in conflict with the Act, Commission regulations and case precedent.

The *Order* also is ill-advised from a policy standpoint because it invites abuse on the part of states hoping to insulate themselves from preemption under Section 252(e)(5). Under the logic of the Bureau's *Order*, all a state need do if it has failed to act with respect to a matter covered by Section 252 is issue an order claiming that it has mooted the matter. The *Order* accordingly warrants review under Section 1.115(b)(2)(iii) as a policy "which should be overturned or revised."

II. BACKGROUND

Global NAPs is a facilities-based competitive local exchange carrier ("CLEC") that operates primarily in the eastern United States. A substantial number of its customers are Internet Service Providers ("ISPs"), for whom Global NAPs provides a dial-in connection to the public switched network.

On April 15, 1997, Global NAPs and Bell Atlantic executed an interconnection agreement that provides for the payment of reciprocal compensation for the termination of local traffic in Massachusetts.[4] After initially paying Global NAPs reciprocal compensation for all calls that Bell Atlantic's end users made to ISPs served by Global NAPs, Bell Atlantic in February 1999 stopped paying Global NAPs for terminating this traffic. Since that time, Bell Atlantic has sent Global NAPs well in excess of five billion minutes of traffic without paying any compensation for the termination of that traffic.

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[4] The agreement states, in relevant part:

> 5.7.1 Reciprocal Compensation only applies to the transport and termination of Local Traffic billable by NYNEX or GNAPs which a Telephone Exchange Service Customer originates on NYNEX's or GNAPs's network for termination on the other Party's network except as provided in Section 5.7.6 below.
>
> 5.7.2 The Parties shall compensate each other for transport and termination of Local Traffic in an equal and symmetrical manner at the rate provided in the Pricing Schedule.

During this time, the DTE has changed its position on the payment of reciprocal compensation to ISPs. It initially held in October of 1998 that ISP-bound calls were subject to compensation under interconnection agreements referring to "local" calls.[5] After this Commission released its *Reciprocal Compensation Order*,[6] however, the DTE on March 23, 1999 entered an order allowing Bell Atlantic to escrow reciprocal compensation payments for CLECs serving ISPs.[7] Although Global NAPs sought to intervene in that proceeding and filed comments in it, the DTE's order did not address Global NAPs' specific agreement with Bell Atlantic. As a result, Global NAPs on April 16, 1999 filed a complaint seeking a determination by the DTE that its agreement with Bell Atlantic called for compensation for ISP traffic.[8]

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[5] DTE 97-116, *Complaint of WorldCom Technologies, Inc. (successor-in-interest to MFS Intelenet Service of Massachusetts, Inc.) against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for alleged breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996* (October 21, 1998).

[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, Declaratory Ruling and Notice of Proposed Rulemaking*, 14 FCC Rcd 3689 (1999) ("*Reciprocal Compensation Order*").

[7] DTE 97-116-B, *Complaint of WorldCom Technologies, Inc. (successor-in-interest to MFS Intelenet Service of Massachusetts, Inc.) against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for alleged breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996* (March 23, 1999).

[8] The *Reciprocal Compensation Order* set out a framework for state commissions to use in determining whether a particular interconnection agreement required compensation for ISP-bound traffic. Specifically, the Commission directed state agencies to consider "all the relevant facts" related to negotiation and performance of the agreement and suggested that "appropriate" factors include whether the ILEC has served ISPs out of intrastate or interstate tariffs; whether it counted revenues associated with service to ISPs as intrastate or interstate; whether the ILEC or CLEC segregated traffic to ISPs for the purpose of billing one another for reciprocal compensation; whether the ILEC included calls to ISPs in local telephone charges; and whether there is any other mechanism to provide compensation for this traffic. *See Reciprocal Compensation Order*, 14 FCC Rcd at 3704.

In May 1999, the DTE vacated its original (October 1998) decision on the grounds that it was inconsistent with the reasoning of the *Reciprocal Compensation Order*.[9] However, the agency refused to apply the analysis for interpreting interconnection agreements outlined in the *Reciprocal Compensation Order*. It also acknowledged that Global NAPs had filed a complaint against Bell Atlantic but refused to address the specific circumstances of Global NAPs' agreement with Bell Atlantic.[10] In fact, the DTE suggested that Global NAPs' complaint remained unresolved and that it expected CLECs to file additional complaints in the future:

> Unless *and until* some future investigation of a complaint, if one is filed, concerning the instant interconnection agreement determines a different basis for such payments, there presently is no Department order of continuing effect or validity in support of the proposition that such an obligation arises between MCI WorldCom and Bell Atlantic. Although MCI WorldCom and Bell Atlantic may still disagree about reciprocal compensation obligations under their interconnection agreement, there is – *post* February 26, 1999 – no valid and effective D.T.E. order still in place to resolve their dispute. Unsatisfying as it may be to say so, all that remains is a now-unresolved dispute.[11]

The DTE also encouraged the parties to negotiate their differences, if possible, and offered the services of its staff as mediators.[12]

By December of 1999, some eight months after Global NAPs filed its complaint against Bell Atlantic, the DTE still had not acted on it. The DTE also had failed to respond to Global

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[9] DTE 97-116-C, *Complaint of WorldCom Technologies, Inc. (successor-in-interest to MFS Intelenet Service of Massachusetts, Inc.) against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for alleged breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996* (May 19, 1999). The DTE noted that its October 1998 order had relied on the "two call" theory to assert jurisdiction over ISP-bound traffic, a theory the *Reciprocal Compensation Order* expressly rejected. A copy of the DTE's order is attached hereto as Exhibit 1.

[10] *Id.* at 7.

[11] *Id.* at 25-26 (emphasis in original).

[12] *Id.* at 30.

NAPs' request for it to mediate Global NAPs' dispute with Bell Atlantic. As a result, Global NAPs was left with a contract that, in its view, clearly requires compensation from Bell Atlantic for ISP-bound calls. It was delivering billions of minutes of ISP-bound calls in Massachusetts at the behest of Bell Atlantic and its end users without receiving such compensation. And it found itself facing a state commission that flatly refused to address the dispute either through its formal complaint process or through informal mediation.

Recognizing that Congress intended in the Act to prevent exactly this sort of state-imposed barrier to local competition, Global NAPs on December 9, 1999 filed a petition under Section 252(e)(5) asking the Commission to preempt the authority of the Massachusetts DTE. On February 25, 2000, shortly before the Commission's deadline for responding to the petition, the DTE issued an order affirming its May 1999 order and abruptly announcing – without any factual or legal analysis – that the May 1999 order had mooted Global NAPs' complaint.[13] The DTE simply ignored the fact that (1) it had never addressed the merits of whether the agreement between Global NAPs and Bell Atlantic required compensation for ISP-bound traffic; (2) obtaining such a determination was the sole purpose of Global NAPs' complaint; and (3) the Commission's *Reciprocal Compensation Order* laid out a detailed framework for state commissions to use in making such determinations. The DTE's blatantly pretextual claim to have mooted Global NAPs' complaint merely confirmed the state's refusal to take any action with respect to the controversy between Global NAPs and Bell Atlantic.

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[13] DTE 97-116-D, *Complaint of WorldCom Technologies, Inc. (successor-in-interest to MFS Intelenet Service of Massachusetts, Inc.) against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for alleged breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996* (February 25, 2000). (A copy of this order is already in the record of this case.)

The Common Carrier Bureau refused to look behind the DTE's mootness determination and, instead, asserted that it will not "focus on the validity" of underlying state decisions in the context of a preemption petition.[14]

III. ARGUMENT

A. The Plain Language of Section 252(e)(5) and Governing Precedent Require the Commission to Review a State's Claim That It Has Mooted a Preemption Petition.

Section 252(e)(5) provides that if a state commission fails to carry out its responsibility with respect to any matter under Section 252,

> the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.[15]

The Bureau refused to assume jurisdiction over Global NAPs' dispute with Bell Atlantic under this provision because it accepted without examination the DTE's claim that it had mooted Global NAPs' complaint against Bell Atlantic. The Bureau reasoned that "[t]he Massachusetts DTE's recent action has rendered moot the need for Commission preemption of the GNAPs/Bell Atlantic dispute."[16] The Bureau stated that it would not "focus on the validity of state commission decisions" and that it "[did] not see a basis for examining the underlying reasoning of the Massachusetts DTE in determining that GNAPs' complaint is moot."[17]

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[14] *See Order* at ¶ 9.

[15] 47 U.S.C. § 252(e)(5).

[16] *See Order* at ¶ 7.

[17] *See id.* at ¶ 9.

In cases involving petitions for preemption under Section 252(e)(5), the Commission has afforded a certain amount of deference to state *procedural* orders and has held that a state does not fail to act merely because it dismisses an arbitration petition on procedural grounds.[18] However, when a state commission claims to have mooted the underlying dispute, the Commission has refused to accept the state's claim at face value and has applied a more careful analysis. In *Petition of MCI for Preemption*,[19] the underlying dispute involved the efforts of MCI Telecommunications Corporation to interconnect with Southwestern Bell Telephone Company in Missouri. When the parties were unable to agree on the terms of a nondisclosure agreement, MCI filed a petition requesting arbitration by the Missouri Public Service Commission. MCI's petition sought arbitration of several issues, including pricing and technical standards for interconnection.[20]

After formal hearings, the Missouri PSC issued an order in December of 1996 that resolved a number of the parties' issues but expressly left others unresolved and encouraged the parties to return to private negotiation over these issues. In January 1997, it issued an order modifying and clarifying aspects of the December order and setting a deadline in which it would establish rates for certain elements under the agreement. In the meantime, MCI and SWB attempted unsuccessfully to negotiate an agreement. In July of 1997, MCI filed a petition seeking preemption of the Missouri PSC's jurisdiction under Section 252(e)(5). On July 31,

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[18] *See Petition for Commission Assumption of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission*, 13 FCC Rcd 1755, 1774 (1997) ("a state commission does not 'fail to act' when it dismisses or denies an arbitration petition on the ground that it is procedurally defective, the petitioner lacks standing to arbitrate, or the state commission lacks jurisdiction over the proceeding").

[19] *Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 12 FCC Rcd 15594 (1997) ("*Petition of MCI*").

[20] *Id.* at 15600.

1997, the PSC issued what it termed a "final" arbitration order that established rates and directed the parties to submit an interconnection agreement consistent with the terms of the PSC's order. This order also recited that it "constitute[d] a final reconciliation of all pending issues from the original Arbitration Order...."[21]

In the preemption proceeding, the PSC argued that its July 31, 1997 order had mooted the interconnection dispute. The Commission reviewed the order and expressly rejected this claim because it found that some of MCI's issues remained unresolved:

> We reject the Missouri Commission's argument that we may not preempt pursuant to section 252(e)(5) simply because the Missouri Commission issued its July 31, 1997 Arbitration Order. That order, issued nearly two weeks after MCI filed its July 18, 1997 preemption petition with this Commission, established permanent rates for unbundled network elements and services for resale and set a deadline for the parties to submit a final interconnection agreement. Although MCI claims that the Missouri Commission, in its earlier December 11, 1996 Arbitration Order, should have set a deadline for the parties to submit a completed interconnection agreement, its preemption petition is based on its view that the Missouri Commission failed to arbitrate "numerous issues which are essential to forging a valid, binding contract." These issues extend well beyond pricing. Consequently, we find that MCI's petition is not rendered moot by the Missouri Commission's July 31, 1997 Arbitration Order.[22]

Although it rejected the PSC's mootness argument, the Commission concluded that MCI had failed to raise its additional issues clearly and specifically in the arbitration. The PSC's failure to address these issues, therefore, did not rise to the level of a failure to act.[23]

The Commission in *Petition of MCI* recognized that a state's claim to have mooted the underlying dispute in a preemption proceeding is, in essence, a claim that it has taken action to

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[21] *See* Missouri PSC, *Final Arbitration Order in Case Nos. TO-97-40 and TO-97-67* (July 31, 1997). A copy of this order (without attachments) is attached hereto as Exhibit 2.

[22] *Petition of MCI*, 12 FCC Rcd at 15613 (footnotes omitted).

[23] *Id.* at 15616.

resolve the dispute. That, in turn, is the very question the preemption petition places before the Commission. Deference to a state order that purports to have mooted the underlying controversy is not appropriate because the statute, quite simply, commands the FCC to determine whether the state has acted. In contrast to a case involving a procedural order, the Commission cannot determine whether the state has acted merely from the fact that it has issued an order claiming to have mooted the controversy. Instead, the Commission must determine the accuracy of that aspect of the state's order.

Had the Bureau examined the DTE's action (or inaction) in the case at hand, it would have seen that none of the DTE's orders mooted Global NAPs' dispute with Bell Atlantic. The May 1999 order certainly had no such effect. Far from resolving Global NAPs' complaint, it did not address the merits of the complaint, repeatedly stated that the issue of compensation for ISP-bound traffic remained unresolved and suggested that further elucidation would have to await the "future investigation of a complaint, if one is filed...."[24] The February 25, 2000 order contained no new analysis and, instead, merely announced that the May proceeding had somehow mooted Global NAPs' dispute. This administrative shell game left Global NAPs no closer to resolution of its dispute with Bell Atlantic than when it filed its complaint 11 months earlier. While the Missouri PSC in *Petition of MCI* at least addressed the majority of MCI's issues, the DTE

[24] A simple comparison of Global NAPs' complaint and the DTE's May 1999 order shows the extent of the DTE's failure to act with respect to the issues raised by Global NAPs. The complaint states that "the terms of the interconnection agreement, the legal and factual context in which it was negotiated, the performance of the parties to that agreement, and relevant state and federal precedent addressing the issue of reciprocal compensation for calls to ISPs all support the conclusion that such payment is required under the terms of the agreement...." *See Complaint of Global NAPs, Inc. Against Bell Atlantic for Declaratory Relief With Respect to Reciprocal Compensation, Motion for Complaint*, DTE 99-39 (dated April 16, 1999) at ¶ 2. (A copy of this document is already in the record in this case.) The May 1999 order notes that Global NAPs has filed a complaint but addresses none of these issues. It also does not purport to moot Global NAPs' complaint.

addressed none of Global NAPs'. As a result, it not only failed to moot the controversy, but also failed to act under Section 252(e)(5).

The Commission itself recently concluded in a separate proceeding involving Global NAPs that the DTE's May 1999 order did not address Global NAPs' complaint or resolve its dispute with Bell Atlantic. In its December 2, 1999 order addressing the legality of Global NAPs' tariff for interstate ISP traffic, the Commission stated that:

> The Massachusetts DTE has yet to make a full and final determination whether the existing interconnection agreement between Bell Atlantic and MCI WorldCom – and by extension, other CLECs, including Global NAPs – provides for any intercarrier compensation for ISP-bound traffic. Not only did the Massachusetts DTE state repeatedly in its May 19, 1999 Order that this issue remains live and disputed, but the May 19, 1999 Order itself (from which 2 of the 5 Commissioners partially dissented) is the subject of several pending petitions for reconsideration. Moreover, on April 14, 1999, Global NAPs filed with the Massachusetts DTE a complaint against Bell Atlantic regarding this very issue, ***and the Massachusetts DTE has not yet resolved Global NAPs' complaint.*** Indeed, in its briefs here, Global NAPs acknowledges (albeit in passing) that the Massachusetts DTE still could decide that the existing interconnection agreement between the parties requires Bell Atlantic to compensate Global NAPs in some way for the delivery of ISP-bound traffic.[25]

The Commission's conclusion – undoubtedly correct – that the DTE's May 1999 order did not resolve Global NAPs' dispute with Bell Atlantic formed an integral part of the Commission's determination that Global NAPs' interstate tariff for ISP traffic, which cross-referenced the parties' interconnection agreement, was unlawfully "indeterminate."[26] As noted above, nothing in the DTE's February 2000 order remotely resolved any issue that the May 1999

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[25] *In the Matter of Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc., Memorandum Opinion and Order,* File No. E-99-22 (released Dec. 2, 1999) ("*Tariff Order*") at ¶ 16 (emphasis added).

[26] *Id.* at ¶ 2; *see also In the Matter of Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc., Order on Reconsideration*, File No. E-99-22-R, (released March 22, 2000) (denying Global NAPs' petition for reconsideration). Global NAPs disagrees that its tariff was unlawful and has appealed the Commission's decision to the D.C. Circuit. *See Global NAPs, Inc. v. Federal*

order had left open. It follows that the Bureau cannot have been correct in concluding that the DTE had "acted." Indeed, the Bureau's statement in that regard is flatly contradicted by the Commission's decision in the tariff case.

As a policy matter, the *Tariff Order* indicated a preference for resolving these disputes in the context of interconnection agreements under Sections 251 and 252 of the Act.[27] Global NAPs has been trying for a year now to do exactly that, but has been frustrated by the DTE's refusal to act. After the *Commission* determined that the DTE's May 1999 order did not moot Global NAPs' complaint, the *Bureau* accepted, without question, the DTE's last-minute claim that it *did* moot the complaint, and denied Global NAPs' preemption petition on that basis. This blatant inconsistency within the agency is the very definition of arbitrary and capricious decisionmaking.

The only authority the Bureau cites to support its claim that it cannot look behind a state commission decision is its own prior order involving Global NAPs's efforts to interconnect with Bell Atlantic in Virginia.[28] That decision is inapposite. The underlying dispute there arose out of an arbitration of Global NAPs' attempt to opt into an existing interconnection agreement between Bell Atlantic and MFS Intelenet. Global NAPs also sought to have the Virginia commission establish mandatory terms for an agreement with Bell Atlantic if it refused to allow Global NAPs to opt into the MFS agreement. The Virginia commission denied Global NAPs' request to opt in and terminated the arbitration proceeding. The state commission also refused to

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Communications Commission, Case No. 00-1136 (appeal pending in U.S. Court of Appeals for the District of Columbia Circuit).

[27] *Tariff Order* at ¶ 18. It is not at all clear that this policy preference is sustainable in light of the D.C. Circuit decision vacating the *Reciprocal Compensation Order*, but that is not critical here.

[28] *Global NAPs, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc.*, CC Docket No. 99-198 (Com. Car. Bur. 1999).

establish alternate interconnection terms because, in its view, Global NAPs had not properly raised this issue before the arbitrator. In the preemption proceeding, the Bureau concluded that the state had not failed to act within the meaning of Section 252(e)(5) and asserted that "[b]ecause section 51.801 of the Commission's rules does not focus on the validity of state commission decisions, we do not see a basis for examining the underlying reasoning of the Virginia Commission."[29]

Although Global NAPs disagrees with the Virginia commission's decision, it does not dispute that the commission reached a decision that fully disposed of the matter. The commission addressed Global NAPs' opt-in request on the merits and denied the request for alternate agreement terms on procedural grounds. The DTE, in contrast, paid no attention to either the merits or procedural posture of Global NAPs' complaint and, instead, took no action on it other than to claim at the eleventh hour in the preemption proceeding that it had been mooted. As the Commission's decision in *Petition of MCI* makes clear, an order that claims to have mooted the underlying dispute goes to the heart of the preemption question – namely, whether the state has acted. Section 252(e)(5) *requires* the Commission to review such an order.

The Bureau's refusal to examine the merits of a state order claiming to have mooted an interconnection controversy invites abuse by state commissions. It suggests that a state can insulate itself from preemption merely by issuing an order claiming to have mooted the underlying controversy. Even if such a claim were blatantly pretextual, as in the case at hand, the Bureau apparently would refuse to review it under the misguided notion that the FCC owes deference to such an order.

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[29] *Id.* at ¶ 18. The Bureau was referring to the FCC's interim rule for addressing preemption petitions at 47 C.F.R. § 51.801.

Such a result not only renders Section 252(e)(5) a nullity, it cedes to the states far more authority than Congress intended. This departure from Congressional intent is particularly troubling when, as here, the preemption petition involves ISP-bound traffic. In its recent decision vacating the *Reciprocal Compensation Order*, the D.C. Circuit pointed out that the Commission's end-to-end analysis has led to intuitively "backwards" results because jurisdictionally intrastate calls are subject to federal reciprocal compensation requirements while jurisdictionally interstate calls are left to potential state regulation. The D.C. Circuit's ruling suggests that the Commission must reverse its counter-intuitive deference to state commissions with respect to the regulation of ISP-bound traffic. Consistent with this, the Commission in the case at hand should reverse the Bureau's automatic endorsement of the DTE's order and should determine whether the state in fact has acted with respect to the dispute between Global NAPs and Bell Atlantic.[30]

B. The *Order* Is Illegal on its Face Because It Is Not Within the Bureau's Delegated Authority and Because Section 252(e)(5) Requires a Commission-Level Decision Within 90 Days.

The *Order* is facially deficient because it is not a proper matter for decision by the Bureau. Section 0.5 of the Commission's Rules provides that Commission staff has been delegated authority to act only with respect to "matters which are minor or routine or settled in

[30] The Bureau also noted that Global NAPs' complaint before the DTE is not one of the specific types of proceedings enumerated in Section 51.801 of the Commission's Rules. *See Order* at ¶ 5. Because it rested its decision on deference to the state's mootness determination, the Bureau declined to address whether the Commission had authority to preempt Global NAPs' complaint. As Global NAPs explained in its comments in this proceeding, Section 252(e)(5) is not limited to particular types of proceedings and specifically refers to a state's failure to carry out its responsibilities with respect to "*any proceeding or other matter* under this section" (emphasis added). Moreover, the rule itself contains no limiting language, and the report and order adopting it expressly provided that it was an interim, minimal measure. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and*

nature."[31] Similarly, Section 0.291 provides that the Common Carrier Bureau does not have authority to act on "any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines."[32] Global NAPs' preemption petition does not present issues that are minor, routine or settled. Rather, it raises important questions about the Commission's obligation under Section 252(e)(5) to determine whether a state commission has failed to act in an interconnection dispute. Although the Commission's decision in *Petition of MCI* is compelling and should be controlling in this case, the issues raised nonetheless are complex and do not arise often. Moreover, the recent D.C. Circuit decision vacating the *Reciprocal Compensation Order* shows that when the dispute underlying a preemption petition involves ISP-bound traffic, as this one does, the law is far from settled.

Section 252(e)(5) confirms that the Bureau lacks authority to issue the *Order*. The statute provides that if a state commission fails to carry out its responsibility, "*the Commission* shall issue an order preempting" the state's jurisdiction within 90 days after receiving notice of such failure (emphasis added). The clear intent of this provision is that the Commission will act on a preemption petition rapidly and that any party aggrieved by the agency's decision will be able to appeal it immediately to a federal court. By issuing its decision at the Bureau level, the agency has attempted an end run around these basic statutory requirements. Because the 90-day deadline for Commission action has already passed, the Commission should reverse the Bureau's unlawful action as soon as possible.

Order, 11 FCC Rcd 15499, 16128 (1996). Any suggestion in the *Order* that the Commission may not assert jurisdiction over Global NAPs' complaint is incorrect.

[31] 47 C.F.R. § 0.5(c). The Commission has also delegated authority to its staff to act on matters where "immediate action may be necessary." *Id.*

[32] 47 C.F.R. § 0.291(a)(2).

IV. CONCLUSION

The Bureau's blatant disregard for governing precedent and statutory language demonstrates that it should not have decided this case in the first place. Its refusal to examine whether the DTE actually mooted Global NAPs' complaint, as opposed to merely claiming to do so, amounts to a flat refusal to discharge its obligations under Section 252(e)(5). Already illegally tardy in this matter, the Commission should reverse the *Order* as expeditiously as possible and perform the sort of careful analysis outlined in *Petition of MCI.*

Respectfully submitted,

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Date: April 5, 2000

EXHIBIT 1

The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

May 19, 1999

D.T.E. 97-116-C

Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996.

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SUMMARY

In February 1999, the Federal Communications Commission ("FCC") declared that telephone traffic bound for Internet service providers ("ISP-bound traffic") and thence onward to Internet websites is a single *interstate* call ("one call") and is therefore subject to FCC jurisdiction under the 1996 Telecommunications Act ("1996 Act"). The FCC's "one call" ruling effectively undercut the jurisdictional claim of any state utility regulatory agency over ISP-bound traffic, insofar as an agency asserted that calls to Internet websites were severable into two components: (1) one call terminating at the ISP and (2) a subsequent call connecting the ISP and the target Internet website. The FCC did not judge state regulators' decision that rested on other bases, apart from noting that decisions resting on state contract law or other legal or equitable considerations "might" still be valid until the FCC issued a final rule on the matter.

In MCI WorldCom Technologies, Inc., D.T.E. 97-116 (1998) ("Order"), relying on prior FCC's decisions that seemed to give greater scope for state jurisdiction over ISP-bound traffic, the Department of Telecommunications and Energy ("Department") had earlier ruled in favor of MCI WorldCom (a competitive local exchange carrier or "CLEC") upon its complaint that the interconnection agreement with Bell Atlantic-Massachusetts, under Section 251 of the 1996 Act, required the payment of reciprocal compensation for handling one another's ISP-bound traffic. The Order held that this interconnection agreement required reciprocal compensation for terminating ISP-bound traffic. The *express and exclusive* basis for the holding was (a) that the link between caller and ISP in ISP-bound traffic was jurisdictionally severable from the continuing link onward from the ISP to the target Internet site, (b) that ISP-bound traffic was thus "local" under the 1996 Act and the interconnection agreement, and (c) that ISP-bound traffic was, therefore, subject to Department jurisdiction as an *intrastate* rather than an *interstate* call. The Department noted that other CLECs' interconnection agreements with Bell Atlantic contained identical provisions and directed Bell Atlantic to treat them accordingly. The Department's Order claimed no other basis for its assertion of state jurisdiction over ISP-bound traffic (i.e., it asserted no jurisdictional claim based on state contract law or other legal or equitable considerations, such as the FCC had noted might underpin some state decisions).

In March, Bell Atlantic moved the Department to modify its Order in light of the FCC's ruling. After considering the motion and responsive comments, the Department today concludes that the FCC ruling has superseded its own 1998 Order and has struck down the sole and express basis for its assertion of state jurisdiction over ISP-bound traffic. The net effect of the FCC's ruling is to nullify MCI WorldCom Technologies, Inc., D.T.E. 97-116. Relying, then, on Section 252 of the 1996 Act, the Department has directed Bell Atlantic and the CLECs to negotiate their renewed dispute over payment for handling each other's ISP-bound traffic. The Department has offered to mediate the dispute, if necessary, and to arbitrate the matter, if required to.

To guide the parties in their negotiations, the Department has set forth certain views on competition in telecommunications and on its need to avoid regulatory distortions that falsely mimic competition but, in fact, simply lead to inefficient, market-entry advantage for certain CLEC/ISP entities through regulator-imposed income transfers.